Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

SINGLE MOMS, INC., a non-profit corporation; DERILYN DORSCHER, CHRISTINE MCCREA, and MARY KAY MCGRATH, individually and on behalf of their minor children,

Petitioners,

v.

MONTANA POWER COMPANY, a Montana corporation; PENNSYLVANIA POWER & LIGHT, a Pennsylvania corporation; NORTHWESTERN CORPORATION, a South Dakota corporation; PAN CANADIAN ENERGY, an Alberta corporation, MONTANA STATE HOUSE OF REPRESENTATIVES, AND MONTANA STATE SENATE, The 55th Legislative Session Members; ENCANA ENERGY RESOURCES, Inc.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

I. Were Fourteenth Amendment rights of Plaintiff Single Moms, 94.2% of whom live below federal poverty line, infringed where electric utility laundered funds through its PAC to lobby deregulation through legislature meeting biennially for 89 days for sole, professed purpose of selling off generating and distribution assets to be invested in fiber optic company controlled by utility's CEO and directors and since forced to file bankruptcy?

II. Did 1972 constitutional abolition of sovereign immunity leave legislators with only *qualified* immunity?

III. If deregulation statutes were unconstitutional, was sale of assets by defendant utility to named defendants void, and is defendant Pennsylvania Power & Light Global [GLOBAL] chargeable with unjust enrichment?

IV. To guarantee Plaintiffs a republican form of government, and given Court's current Guaranty Clause justiciability jurisprudence, is court required to (i) declare state's "separation of powers" government quasi-monarchical and (ii) are there "judicially manageable standards" Circuit can draft to enable District Court to enforce Court's decision?

V. If Court is now unprepared to require legislature to elect state's chief executive and department heads, because both chambers are elected one-person, one-vote, and well-financed lobbyists use bicameralism to thwart efforts of single moms to enact pro-children legislation, should Court outlaw bicameralism?

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DECISIONS BELOW & BASIS FOR JURISDICTION

The ruling of the United States Court of Appeals for the Ninth Circuit in *Single Moms, Inc. a non-profit corp. et al. v. Montana Power Co. et al,* No. 02-35361 entered June 10, 2003 is reproduced in Appendix B. An extension was granted by Circuit Justice O'Connor until October 7, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court Rules.

The Order and Opinion of the United States District Court for Montana, CV 01-46-BU-DWM, *Single Moms, Inc. a non-profit corp. et al. v. Montana Power Co. et al,* February 6, 2002 is reproduced in Appendix C.

STATEMENT ON JURISDICTION

After defendants filed Rule 12(b)(6) Motions to dismiss Amended Complaint, plaintiffs filed Motion for Summary Judgment. District Court granted defendants' Motions and, finding plaintiffs' SJM moot, dismissed Complaint. Plaintiffs appealed. Circuit Court affirmed.

Single mother plaintiffs with minor children residing in Montana claim denial of federal due process and equal protection rights under the Fourteenth Amendment and 42 USC § 1983 because of loss of property rights (marked increase in utility rates) resulting from CEO of Montana Power Company (MPC) aggressively

lobbying legislature to enact deregulation legislation of which MPC was sole beneficiary allowing it to sell off its assets to fund its wholly owned fiber-optic telecommunications company regardless of the impact on plaintiffs and the elderly. District Court has original jurisdiction under 28 USC § 1331 and 42 USC § 1983.

The Circuit Court has jurisdiction under 28 USC § 1292 and § 1651.

Rule 29.6 Corporate Disclosure Statement

Single Moms, Inc., a non-profit corporation, issued no stock, had no assets and no subsidiaries.

CONSTITUTIONAL PROVISIONS

Petitioners rely on Section One of the Fourteenth Amendment and Section Four of Article IV of the United States Constitution, set out in full at Appendix D.

STATEMENT OF THE CASE

Where power company moves funds through its PAC to induce 3 month biennial session of legislators devoid of staff to deregulate electricity and gas; where utility CEO in press releases admits utility seeks deregulation for sole purpose of spinning off assets to put the cash into its wholly-owned fiber-optic telecommunications subsidiary, "Touch America", and Public Service Commission rate expert testifies in District Court hearing that in 1996 state produced 5,000

megawatts of electricity but used only 1,600, and plaintiffs submit evidence single mothers and elderly on fixed incomes are unable to pay higher power and gas bills caused by fictitious "customer choice" legislation, and 40 states in 1996 had higher power rates than Montana including Massachusetts whose rates are twice as high, plaintiffs allege deregulation legislation was unconstitutional because funding Touch America was not a "compelling state interest" under strict scrutiny review but passed (1) for a special purpose and (2) denied plaintiffs and elderly the necessities of life protected by Fourteenth Amendment and Guaranty Clause.

REASONS FOR GRANTING THE WRIT

Issue I. Can contributions of its officials laundered by corporation's PAC be used to lobby legislature?

Where state produces native load of 5,000 megawatts, selling 1,600 instate at one of lowest residential and commercial rates in the nation, and Amended Complaint alleges in 1997 Montana Power Co. [MPC], its CEO, Bob Gannon [GANNON], and officers despite constitutional prohibition against legislative "special privileges . . . or immunities" [Art. II, § 31] and absent a "compelling state interest", report paying through MPC's PAC, "*Committee for Responsible Government*", $17,962[1] to 1995

[1] Insignificant compared to $1.45 billion lobbyists paid to members of Congress in 1999, but more than *Single Moms'* nothing.

and 1997 legislators or 87% of the 55th Legislature who voted for deregulation and $70,615.37 to 18 lobbyists [Complaint, p. 12] hired to induce 83 term-limited biennial-session 89 day "citizen" legislators devoid of paid staff other than the 18 lobbyists[2] to pass deregulation legislation drafted a year earlier by MPC and Goldman Sachs for professed purpose of selling off MPC's assets worth $3 billion to be invested in fiber optic company, Touch America (of which GANNON is CEO and which in September, 2003 filed bankruptcy notifying Butte and Denver employees by Email they were fired after GANNON and a few associates pocketed $3 to $5 million in "silver parachutes"), and

Where deregulation resulted in substantial price increases for power and gas for state's Single Moms, 94.2% of whom live below federal poverty line [Ex. 1] some working (in 2003) for $2.50 an

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[2]"When lobbyists make a political contribution from their own funds to those persons whose actions they are paid to influence, there is at least the appearance of corruption. . .FN15 The court in *NCRL* wrote, With respect to actual corruption, lobbyists are paid to effectuate particular political outcomes. The pressure on them to *perform mounts as legislation winds its way through the system.* If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange dollars for political favors can be powerful. [Additionally,] [e]ven if lobbyists have no intention of directly purchasing favorable treatment, appearances may be otherwise. . ." *Institute of Governmental Advocates v. Fair Political Practices Comm.,* 164 F.Supp. 2d 1183, 1195 (2001) (emph supp)

hour [Court is requested to judicially notice 1996 Work Welfare Act was in 2002 a 90% failure in Montana and 95% failure on its reservations (AP dispatch, Helena, 2/12/02), that since 1998 Montana workers have had lowest average wages in Union and single moms seeking an education in 2003 must pay tuition amounting to 60% of total operating cost of entire U of M system] and

Where MPC historically controlled state government[3] to such an extent it had the economic clout to eliminate annual sessions[4] a year after voters approved them in 1972 constitution, and where defendant legislator who spear-headed deregulation is later hired by MPC as a lobbyist [Complaint, p. 13, Ex. 6] and still later by MPC's vendee of its distribution system, defendant Northwestern, helping his new employer – despite Art. II, § 31 - obtain legislative immunization from suit [SB 458], while Northwestern informed dissatisfied MPC shareholders [Ex. 2] they could still sue

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[3] "A State is not justified, we said, in permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton,* 382 US 313, 86 S. Ct. 486, 488, 15 L ed. 2d 373, 377 (1966)

[4] Late Leo Graybill, Jr., Esq., president of 1972 Constitutional Convention remarked, "If Montana Power had its way, the legislature would only meet every ten years."

GANNON, and which itself in September, 2003 filed in Delaware bankruptcy court for Chapter 11 protection,

Was Circuit description of this conduct as purely *governmental* action devoid of *private* collusion accurate, or was PAC of MPC a ruse to avoid the sanctions of *Austin v. Michigan Chamber of Commerce*[5] and of the *Guaranty Clause* designed to guarantee Single Moms the right to enjoy the benefits of a republican form of government.[6]

Issue II. Did 1972 abolition of sovereign immunity leave legislators with only *qualified* immunity?

Was Circuit in error when it held lawmakers including ex-lawmaker defendant hired by MPC and later Northwestern as lobbyist had *absolute* immunity?

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[5] 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). Cited by Ninth Circuit as authority that "corporations use state-created advantages to dominate both the economic and the political arena." *Vannatta v. Keisling, Sec'y of State of Oregon,* 151 F.3d 1215, 1217 (1998)

[6] Guaranty Clause cases finding justiciability have appeared earlier. *Forsyth v. Hammond,* 166 U.S. 506 (1897) and *Minor v. Happersett,* 21 Wall. (88 U.S.) 162 (1875). Is Clause a restraint on Congress' power to regulate the activities of the States? *New York v. United States,* 112 S.Ct. 2408, 2432-2433 (1992). *Gregory v. Ashcroft,* 501 U.S. 452, 463 (1991) If so, will Single Moms be in even greater danger if parliament is not mandated?

Given (i) conditions outlined in Issue No. I, (ii) abolition of state immunity [Art. II, § 18] and (iii) limiting legislative immunity to "not be(ing) questioned in any other place for any *speech or debate* in the legislature" (emph supp) [Art. V, § 8], do Montana legislators have only a qualified immunity? Further, is it time for the Court to revisit its McCarthy era decision overruling this Circuit's decision in *Tenney v. Brandhove,* 341 U.S.367, 71 S.Ct. 783 (1951) where even majority held "Legislatures may not of course acquire power by an unwarranted extension of privilege", and concurring Justice Black wrote "legislators are immune from legal responsibility for their intra-legislative statements and *activities*" (emph supp) but adding "there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act." 71 S.Ct. 783, at 789-790 Dissenting Justice Douglas asked whether Un-American Activities Comm. may "depart with impunity from their legislative functions" [charged with "smearing" as a "Red" a Congressman running for mayor of San Francisco]. 71 S.Ct. 783, at 790-791 In any event, is not *Tenney's* ruling on slander inapplicable to the facts *sub judice*? Is immunity limited to *legitimate acts*? *In re Duncan* No. 1174 decided 3/30/1891, 139 US 449.

Issue III. If deregulation statutes were unconstitutional, was sale of assets by defendant utility to named defendants void, and is defendant Pennsylvania Power & Light Global [GLOBAL] chargeable with unjust enrichment?

Where economic catastrophe results from state's "separation of powers"[7] government's inability to provide for basic needs of less than a million inhabitants in Union's geographically fourth largest state, state government has a century old history dating from the War of the Copper Kings of inability to prevent its domination by powerful corporations, and Guaranty Clause is not identified in Complaint in *haec verbis*, but Complaint's allegations make out a Guaranty Clause cause of action, is Clause presumed included[8] within Complaint's Fourteenth Amendment prayer for relief?

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[7] James Madison, Jr. in Federalist Paper #47 attributes this doctrine to the "oracle," Baron de Montesquieu, 1748 author of "Spirit of the Laws"and great admirer of British system, who taught "a republic is like a body without a head".

[8] "This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender." *Baker v. Carr,* 369 US 186, 82 S Ct 691, 7 L ed 2d 663, 691 (1962) Yet the Court goes on to say "Specifically, we have said that such claims are not held non-justiciable because they touch matters of *state governmental organization.*" 7 L ed 2d 692 (emph supp) "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 7 L ed 2d 663, 693 [For 1997 review on Guaranty Clause see 120 L ed 2d 957]

Issue IV. Does Guaranty Clause authorize Court to order replacement of monarchical (separation of powers) government with a "unity of powers" government as last and only resort to purge century-old history of Fourteenth Amendment violations?

Issue V. To insure state has republican form of government in future, after declaring SB 390 and SB 396 violative of the Fourteenth Amendment and granting Single Moms other relief prayed for in Complaint, is existence or non-existence of republican form of government (i) justiciable under Court's Guaranty Clause jurisprudence requiring Court to declare state's so-called "separation of powers" government is monarchical and not republican and (ii) are there "judicially manageable standards" Circuit can draft to enable District Court to enforce this Court's decision?

> The nonjusticiability of a political question is primarily a function of the separation of powers. *Much confusion* results from the capacity of the "political question" label to *obscure* the need for a case-by-case inquiry. (emph supp) *Baker v. Carr,* 369 US 186, 7 L ed 2d 663, 682, 82 S Ct 691 (1962)

Given the Court's jurisdiction over the parties herein and its counsel including the attorney general and where "there is a clear (presence[9]) of judicially manageable standards"[10] after this

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[9] "absence" in original, 12 L ed 2d 539

[10] *Reynolds v. Sims,* 377 US 533, 12 L ed 2d 506, 539, 84 S Ct 1362 To be justiciable under the Guaranty Clause, a question must be apolitical and be subject to "judicially manageable standards."

Court, having concluded the state has indeed a monarchical[11] form of government patterned after that of George III in 1787 and there is no known judicial remedy or cure for or "judicially manageable standards" with which to measure the biennial legislature's vulnerability to periodic assaults by corporations armed with huge amounts of stockholders' money and large legal staffs, cannot the Court instruct the Circuit to draft instructions for the District Court directing the Montana secretary of state to prepare a

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[11]In 1786 John Jay asked Washington if he wanted to be king. Washington, who never allowed anyone to sit while he was standing or to touch him, declined.

On May 29, 1787 Delegate Edmund Randolph proposed the Congress (read "majority party") choose the chief executive, as did William Patterson of New Jersey on June 15 and the Committee of Five on August 6. The Convention finally accepted New York attorney Hamilton's proposal for a life-time chief executive with (i) an *absolute* veto (last used when Queen Anne vetoed parliament's 1717 Bill funding the militia), (ii) absolute authority as commander-in-chief to send royal navy and royal army wherever and whenever he chose, (iii) absolute power to hire *and* fire ministers, and (iv) life time senate all *as modified by Madison.* The Virginia Delegate in Federalist Paper #47 urges New York voters to approve the new constitution because "it is just like England's".

Realizing Hamilton's philosophy had won over convention thinking, the other two New York Delegates, Robert Yates – that state's first chief justice – and John Lansing, New York's first chancellor, left Philadelphia in July.
Secret Proceedings and Debates of the Convention

ballot setting up a parliamentary government[12] for the state [Ex. 3 – sample one house parliament] requiring department heads be

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Assembled at Philadelphia in the year 1787, Robert Yates, Esq., Preface, Albany July, 1821, Publ. by Alston Mygatt, Louisville, KY 1844. England did not have true parliamentary government until the Reform Act of 1832. Of the 65 chosen Delegates, 10 never attended and 16 refused to sign the final document.

During a session at the U.S. Army War College on how the active military viewed its duty to obey orders of superior officers and their oath to support the Constitution, the writer asked a non-lawyer classmate "if President Nixon ordered you to surround the Capitol and arrest Majority Leader Mike Mansfield and Speaker Carl Albert, would you do it?" The then lieutenant colonel (later flag officer) looking the writer in the eye without hesitation replied "he's commander-in-chief, isn't he?"

[12] A U.S. Parliament was favored by all of the attendees at the Jan. 10-11, 1981 Constitutional Reform Conference in Washington arranged by Dr. Hardin, U of C, Davis. [Ex. 4] Dillon (signature missing) was secretary of treasury under Eisenhower & Kennedy. Cutler could not attend because trying to get embassy hostages out of Teheran. Woodrow Wilson and William Howard Taft favored a U.S. Parliament. James MacGregor Burns details FDR's insistence on independence for Indochina after evicting the Japanese. FDR ordered Gen. Wedemeyer not to give the French any ammunition or supplies. *Roosevelt, Soldier of Freedom,* James MacGregor Burns, Harcourt Brace, NY, 1970, p. 591. If Deputy Prime Minister Truman knew this policy, 58,000 servicemen would not have been killed in Vietnam.

elected members of majority party in unicameral legislature and chief executive and his/her deputy be members of that majority and providing for financing a small staff for the Minority Leader, remaining details to be worked out by the Circuit in its Instructions to the District Court, whose staff will assist the secretary of state in composing any remaining issues for the ballot to be submitted to the state's voters at the election following the next election.

Because SB 390 and 396 are unconstitutional, the sale of MPC's assets to defendants PPLM, NorthWestern and other defendants are null and void, and the assets should be returned to MPC with MPC returning the cash to the vendee defendants.
16A Am Jr 2d *Constitutional Law,* p. 90

Acting In Concert

SB 390 and SB 396 (Chapter 505 of the 55th Montana Legislature) were drafted by MPC and Wall Street investment bankers Goldman Sachs, not by the legislature. *Acting in concert,* MPC and defendant legislators in violation of the constitutional and statutory rights of plaintiffs including CLASS *either with gross negligence or in the absence of slight or of any care* enacted SB 390 and SB 396 which restructured Montana's electric and natural gas utility industries by providing a fictitious "customer choice". That MPC and defendant legislators knew, or in the exercise of reasonable care, should have known

SB 390 and SB 396 would raise to prohibitive levels the cost of power and gas for plaintiffs. That indeed, MPC now admits the legislation it drafted raised prices for commercial and residential users, such as these plaintiffs. *Complaint*, pp. 7 & 8; Ex. 2

Affidavit of Economist

1) The extracts from affidavit of Professor Thomas M. Power, chair of Department of Economics, University of Montana [Excerpt #7] in support of plaintiffs' Motion for Summary Judgment evidence the indifference of MPC and lawmakers who knew in advance the devastating impact of SB 390/396 on plaintiffs' federal and state fundamental rights:

"6. I have served on the Montana Power Company Conservation and Least Cost Planning Advisory Committee since it was formed in 1988 and continue to serve on the (MPC) Universal Systems Benefits Advisory Committee.

"8. When the restructuring of Montana's electric and natural gas utilities was proposed by the MPC and others to the Montana Legislature, Montana Power and the Legislature were *well aware of the market risks that customers would face* as a result of the abandonment of regulated electric and natural gas supplies. When electric and natural gas supply prices are determined by national and regional markets instead of on the basis of the cost of the regulated utility's own

supply, there is *almost no limit* on how high those energy costs can rise since sellers can charge *whatever the market will bear.* Those *risks of higher prices were widely discussed at meetings of the MPC Advisory Committee,* in forums sponsored by the *Montana Public Service Commission,* in other public discussions *including those within the Montana Legislature.*

"9. The *financial risks associated with the unregulated, high, market prices for electricity and natural gas are especially severe for those living on fixed incomes who can pay the higher utility prices only by cutting back expenditures on other goods and services. Relatively low-income households such as the elderly relying on Social Security and single mothers raising young children are especially at risk to the rising costs of necessities such as electricity and natural gas.*

ABSENCE OF "ANY CARE"

"10. MPC and others who worked to force Montana Power Company customers, directly or indirectly, to give up the protection of cost-of-service based regulated prices for market based prices **consciously gambled,** in their **customers' names,** that market prices would be lower than regulated prices. MPC *lost that gamble and its customers are now paying the price.*

"11. MPC consciously put its low and fixed income customers at *serious* financial risk, including the risk of going without the basic necessities of life. In doing so, it offered those customers no substantial protection against those risks. This has already led natural gas prices to rise and employment opportunities to shrink. After July 1, 2002, electric prices will also rise dramatically. The net result will be that (MPC's) customers will be poorer and its low and fixed income customers will be threatened." (emph supp)

Hearing Testimony re Surplus Power

2) Eric Eck, Public Service Commission specialist, testified that in 1996 [prior to deregulation] Montana produced 5,000 megawatts of power annually but only needed 1,600 megawatts. [Excerpt #5, Transcript, p. 48, line 23 – p. 49, line 3]

3) 12/17/99 press release [Excerpt #6] jointly drafted by defendants PP&L and MPC [of which the Court is asked to take judicial notice under F.R.Evid. 201(d)] quotes MPC CEO Gannon

"We will use the proceeds from the generation sale for additional investment in Touch America's plans for a 23,000 mile fiber-optic network, as well as for developing its wireless communications licenses from the Pacific Northwest to the Upper Midwest and as far south as Colorado," Gannon said. [PR, p. 4]

4) Affidavit of Professor Paul E. Miller, Department of Sociology, University of Montana [Excerpt #8] cites Table DP-1 from the U.S. Census Bureau as authority for there being "21,201 households in Montana with a female householder with no husband present but with minor children," and Dr. Miller's 1998 study on Welfare Reform indicating 94.2% of Montana households with a female head and dependent children are below the federal poverty line and 87.2% (1997) on our seven Indian Reservations; Table DP-1 finds ***158,894 Montanans (of a total of 902,195) are over age 60*** (most of whom are on a fixed income)

5) NORTHWEST JOB GAP STUDY, *Searching for Work that Pays, 2001, Montana,* released June 26, 2001 [Excerpt #9] indicates Household 2 must have a gross annual income of $24,351 and Household 3 $30,784 while 36,558 children live in 20,669 single parent household receiving less than a living wage; the Court is requested to take Rule 201(d) notice of this publication under Rule 803(8) and of attached letter of 6/19/01 from Carole Meyers, executive director of Missoula Indian Center, to counsel [Ex. 10] under Rule 803(6) and (8)

6) Attached report of Montana Department of Public Health and Human Services [Excerpt #11] demonstrates the increase in Low Income Energy

Assistance Program [LIEAP] applications from 17,218 in 2000 up to 22,061 in 2001. The Court is requested to judicially notice this 4,843 *increase* in households unable to pay their energy bills.

CONCLUSION

Single Moms assert they offered adequate proof to meet their burden in support of their Summary Judgment Motion. The burden of proving a genuine issue of material fact exists has shifted to the several defendants.

Summary judgment is never a substitute for a trial on the merits. *Krieg v. Massey* (1989), 239 Mont. 469, 471, 781 P.2d 277, 278. If the moving party has met its burden of proof, however, the nonmoving party has the burden of showing that a genuine issue of material fact exists or that the moving party is not entitled to judgment as a matter of law. *Krieg,* 781 P.2d at 278. *Morton v. M-W-M, Inc.* (Mont. 1994), 263 Mont. 245, 868 P.2d 576, 579-580

The Court is requested to reverse the lower court decisions and require the state legislature to elect a Premier and department heads and Minority Leader, or, at a minimum, eliminate bicameralism, and direct the District Court to issue a scheduling order setting the case for trial.

Respectfully submitted at Butte, Montana this 6th day of October, 2003.

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EXHIBITS

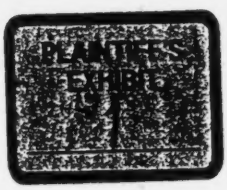
1, 2, 3 & 4

Income and Housing Costs in Two Montana Studies: Focus on Female-Headed Households With Dependent Children				
Selected Categories	(1997-98) Impact of Welfare Reform Study* (N=151 Households)		(1996-97) Food Distribution Program on Indian Reservation Study** (N=1,356 Households)	
	Female-Head, Dependent Children (n=85)	Other (n=66)	Female-Head, Dependent Children (n=623)	Other (n=733)
Percent Below Federal Poverty Line	94.2%	86.3%	87.2%	85.5%
Average Household Monthly Income	$574	$839	$649	$656
Average Household Monthly Income Per Capita	$196	$218	$228	$570
Average Monthly Housing Costs (mortgage/rent + utilities)	$275	$349	$283	$221
Average Monthly Utilities	$85	$115	$131	$102

* Study funded by Northwest Areas Foundation.

**Study funded by Montana Hunger Coalition and Montana Department of Health and Human Services

(Note: Both studies conducted by Paul Miller, Department of Sociology, University of Montana.



TO FORMER MPC SHAREHOLDERS & NORTHWESTERN ENERGY CUSTOMERS

THE TRUTH ABOUT SB 458

A group of plaintiffs' attorneys are spreading a lot of misinformation about SB 458. The proposed legislation does not prevent former MPC shareholders from suing to recover stock losses.

SB 458 simply provides an opportunity for NorthWestern Energy to be out of the plaintiffs' lawsuit. NorthWestern bought the "poles and wires" from MPC after the shareholders approved the sale. It is unjust for NorthWestern to be sued by those same shareholders for decisions made by MPC's officers and directors.

If SB 458 passes, the following parties can still be sued:

a. Bob Gannon and the former officers of MPC
b. The former board of directors of MPC
c. Goldman Sachs (investment advisor to MPC)
d. Milbank, Tweed (legal advisor to MPC)
e. Touch America Holdings, Inc. (successor to MPC)
f. PPL-Montana (purchased assets without shareholder approval)
g. Westmoreland Mining (purchased assets without shareholder approval)
h. Pan Canadian Petroleum (purchased assets without shareholder approval)
i. CES Acquisitions (purchased assets without shareholder approval)

If NorthWestern ends up paying a major judgment in this lawsuit, even though it did nothing wrong, the company's ratepayers might be stuck paying the tab. Call your State Representative at 406-444-4800. Ask for a YES vote on SB 458.

Ex. 2

SB 458: Good for Ratepayers, Good for Montana

Paid for by: NorthWestern Energy, 40 E. Broadway St., Butte, Montana 59701

DELEGATE PROPOSAL
No. 136 - Parliament

MONTANA CONSTITUTIONAL CONVENTION

1971-1972

DELEGATE PROPOSAL NO. 136

Ex.3

DATE INTRODUCED: FEB. 3, 1972

Referred to Legislative Committee

Referred to Executive Committee

A PROPOSAL FOR A NEW CONSTITUTIONAL ARTICLE PROVIDING FOR A PARLIAMENT.

BE IT PROPOSED BY THE CONSTITUTIONAL CONVENTION OF THE STATE OF MONTANA:

Section 1. LEGISLATIVE POWER. The legislative power of the state shall be vested in a Parliament consisting of one chamber; but the people reserve to themselves the initiative, including the right to amend this Constitution, and referendum powers.

Section 2. MEMBERSHIP. The number of members of the Parliament shall be prescribed by law but shall consist of not less than 100 nor more than 110. The state shall be divided into as many districts as there are members of the parliament and each district shall elect one member.

Section 3. TERM AND QUALIFICATIONS. Members of Parliament shall serve a term of four (4) years. One-half of the members shall be elected every two (2) years. No person shall be a member of Parliament who is not a qualified voter of the state and who has not resided in the state for more than one (1) year next preceding his election.

Section 4. SESSIONS. Parliament shall convene the first Monday of February of each year and shall continue until adjournment. It may reconvene at any time at the request of a majority of Parliament.

Section 5. EXECUTIVE. Parliament shall choose a leader from among its members and that leader shall assume the executive authority of the state and shall provide for the proper administration of the laws of the state. The leader shall appoint a cabinet who shall assist the leader in directing the efforts of the departments of executive authority.

Section 6. DISSOLUTION. (a) At any time during a parliamentary session, the leader may call for a dissolution of parliament. Upon a majority vote pursuant to this call, the parliament shall be dissolved and new elections shall be held according to law.

(b) At any time during a parliamentary session, a majority of the members of parliament may call for dissolution of the parliament. Upon a two-thirds (2/3) vote, pursuant to this call, the parliament shall be dissolved and new elections shall be held according to law.

Section 7. PROCEEDINGS. A majority of all of the members of Parliament shall constitute a quorum to do business but a smaller number may adjourn from day to day to compel the attendance of absent members. Parliament may establish committees for the conduct of business and all committee meetings shall be open to the public and adequate public notice shall be given in advance of such meetings. Members of minority parties shall be appointed to committees by their own leadership in proportion to the numerical strength of said party.

Section 8. RECORDATION. Parliament shall have the power to determine the rules of its proceedings and shall publish a journal of those proceedings. Upon the final disposition of any question the ayes and nays must be recorded if requested by any two (2) members.

Section 9. Any powers not specifically reserved herein are granted to the Parliament.

INTRODUCED BY: /s/ Robert Lee Kelleher

/s/ Paul K. Harlow
/s/ Miles Romney
/s/ Dorothy Eck
/s/ Edith Van Buskirk
/s/ Katie Payne
/s/ J. K. Ward
/s/ A. W. Kamhoot
/s/ Jean H. Bowman
/s/ Carman Shari
/s/ George H. Collins

/s/ George P. Miller
/s/ Lucile Speer
/s/ Lyle E. Monroe
/s/ Harold Arbanas
/s/ Gene Harbaugh
/s/ Virginia H. Blend
/s/ Marjorie Cain
/s/ Richard J. Chasnoff
/s/ Robert Vernillion
/s/ W. H. Swanberg

Ex. 3a

Conferees Constitutional Reform, Washington Conference, Jan. 10-11, 1981

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Ex. 4

APPENDICES

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DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

AMENDED COMPLAINT

SINGLE MOMS, INC. a non-profit corporation; Derilyn DORSCHER, a Single Mother, Individually and as Guardian ad Litem of Christian and Jamie DUMAINE, Minors; Christine McCREA, a Single Mother, Individually and as Guardian ad Litem of Sage and Hayden McCREA, Minors; Mary Kay McGrath, Single Mother, Individually and as Guardian ad Litem of Nicholas and Roxanne, Minors, and all Others Similarly Situated, a CLASS; all also as *Qui Tam* Plaintiffs on behalf of the State of Montana,
Plaintiffs & Petitioners, and

Matt Brainard, Gary Feland,
Bob Rowe, Bob Anderson,
and Jay Stovall in their official capacities
as members of the Montana Public
Service Commission, and John Martin
MORRISON in his official capacity
as State Auditor,

Involuntary Plaintiffs,

vs.

Montana Power Company, a Montana corporation; Pennsylvania Power & Light, a Pennsylvania corporation; and NorthWestern Corporation, a So. Dakota corporation; Pan Canadian, an Alberta corporation, and Joe QUILICI and 57 other 55th Legislative Session Members of the House of Representatives, and Fred THOMAS and 24 other 55th Legislative Session Members of the Senate, as named in Appendix A, all Individually and not in their official capacity as members of the 1997 Legislative Session,

Defendants and Respondents.

COME NOW plaintiffs and petitioners and for their First Cause of Action allege and pray as follows:

JURISDICTION

The plaintiffs McGRATH reside in Silver Bow County; plaintiffs DORSCHER reside in Deer Lodge County; plaintiffs McCREA reside in Jefferson County, Montana; defendant Montana Power Co, (MPC) and defendants and respondents who were members of Montana's 55th Legislative Assembly are residents of the state of Montana. Pennsylvania Power & Light (PP&L), NorthWestern, and Pan Canadian Ltd. are foreign corporations.

§ 1 of the Civil Rights Act of 1871 provides in relevant part:

> Every person who, under color of any statute,...of any State...causes to be subjected ...any citizen of the United States...to the deprivation of any rights...secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress... 42 USC 1983 and 1988

Plaintiffs seek injunctive relief under 27–19–104, MCA. Plaintiffs allege that the security described in 27-19-306, MCA is inapplicable herein, but that if the Court finds it is then in that event the Court find said security requirement unconstitutional as violating the Equal Protection Clauses of the U.S. constitution and Montana constitution as well as sections 16 and 3, Art. II of the latter.

That in addition to injunctive relief plaintiffs seek damages in the amount of Five Million Dollars ($5,000,000.00) to be paid to the CLASS plus Twenty Five Thousand Dollars ($25,000.00) for each of the named plaintiffs plus attorney fees and cost reimbursement to be set by the Court.

FACTS

I. Heat & power essential for survival—*basic necessities*

Bobbi Jo MEYERS, age 37, is a single mother who formerly resided with her two boys James 8 and Matthew 7, in the home she was buying at 1123 Caledonia, Butte; in January, 2001, MEYERS, a flight attendant with Alaska Airlines for the past 12 years for the medical benefits for herself and children and the retirement benefits typically works 2 to 4 days at a time and is gone from her home 5 days a week, paid MPC $300 for gas and light in January, $400 in February; in March MPC demanded another $500 (which she paid with her tax refund) and in April another $300; because of the amount of her mortgage payments MEYERS could not pay both the mortgage and utility bills; she offered to pay $100 in April but MPC told her "$100 is not enough on this astronomical bill" and told her "everyone is in this situation"; the defendant Public Service Commission (PSC) tried unsuccessfully to intervene on her behalf; she was scheduled to have her power cut off on Wednesday, April 18, 2001 but MPC did not have adequate personnel to cut off her power because they were cutting off so many other Butte customers; that the cost of power and gas to her then home at 1123 Caledonia St., Butte increased dramatically in 2000

A.D.; that if she quit her job with Alaska Airlines and went on welfare she would qualify for the Low Income Energy Assistance Program (LIEAP) and Energy Share. MPC demanded a $ 1,000 deposit. Her monthly take–home check is $1,503. MPC suggested she borrow the money to pay her gas and light bill, but both of her parents are deceased; that her water and telephone bills were already two months delinquent. The treatment she received from MPC had a deleterious effect on her self-esteem and feelings about her dignity as a human being.

Plaintiff DORSCHER, an LPN employed by Nightingale Nursing of Missoula as a home nurse working from 8 am to 6 or 7 pm, resides at 1210 E. 6th St., Anaconda, has 4 children, two of whom are minors: Christian Dumaine, age 11, and Jaime Dumaine, age 16. That in March, 2001 MPC told her by phone she needed to pay $207 in addition to her regular bills and DORSCHER told MPC she could not "keep up" with the MPC payment contract to which she had agreed, but she would try to pay the current bills and send more after she no longer needed heat. Dorscher could not call MPC from the patient's phone because of the long waits. On 4/3/01 MPC sent her a form letter [Ex. 1] saying service would be discontinued within 13 days if "the delinquency (of $806.50) is not resolved", and which she could pay by credit card by "dialing SpeedPay at 8-877-361-4927". That DORSCHER had no such credit card availability. When she got home from work on 4/19/01 her daughter told her the house was without power. When she called MPC on 4/19/01, MPC told her to borrow the money form family members, friends or a bank, and to apply for LIEAP, for which she does not qualify because of her hourly

wage. That she does not want to go on welfare to be eligible for LIEAP. MPC also informed her they had a form she had filled out for MPC stating she had no children. On Friday, 4/20/01, she called MPC to say she was waiting for her mail and pay check and could they turn the power back on. She was told she would have to wait 24 hours to get the power turned on. On 4/20/01 using all of her paycheck plus some borrowed money which left her with no money for her other bills, at 2:25 PM she paid $806.50 [Ex. 2] at Albertson's in Anaconda. After paying the $806.50 she placed a call to MPC at 2:30 PM but was kept on hold until a MPC person answered at 2:55 PM, by which time she was so angry and frustrated after months of this kind of treatment that she kicked her phone jack and got disconnected, and had to call back. By 3:15 PM she was able to reach a MPC person, gave her the receipt number and by 3.30 PM the power was turned back on. Because she used her entire pay check plus borrowed money to pay MPC, she was forced to turn to the Catholic Community in Anaconda for food and a gas voucher to get back and forth to her job in Butte. As a direct and proximate result of her experience with MPC DORSCHER has a lower self-esteem and no longer looks at herself as a person entitled to human dignity.

Plaintiff McCREA, 622 Main St., Three Forks, rents a small house. She is employed as a nursing home attendant at $7 an hour. She claims in November, 2000 her gas/light bill appeared to almost double and to continue to rise each month thereafter. Her monthly rent is $400, which she paid in bi-monthly installments of $200. Because of the increased gas/power bill from MPC she began last winter to pay her landlady only $150 each payday,

later $100 each payday and finally nothing. Her inability to pay her rent when due caused her severe stress, and lowered her self- esteem. Although her landlady was most understanding and even paid to put new siding and windows on the house to conserve heat, McCREA became more and more panicky about supporting and feeding her 8 and 9 year old sons and protecting their health. She worked longer and longer hours. She used her income tax refund to pay her landlady $425 at the end of April to catch up on her rent, but remained 3 months behind on her water bill and still owed over $300 on her MPC bill. When she phoned MPC in April they demanded $95.78 that day plus $95.78 in 10 days plus the current bill. They wanted $95.78 each month for 3 months in a row in addition to current charges. Weeks and months of this type of harassment by MPC caused McCREA mental suffering resulting in her inability to sleep at night not knowing how she would take care of her two boys. The treatment by MPC made McCREA feel she was less than human, had low self-worth and had little or no dignity left as a human being.

McCREA's hourly pay is $7 an hour at the nursing home—her take-home is $790 a month. She could work more hours at the nursing home but she can't afford daycare for her 2 boys. The cheapest daycare in Three Forks is $3.50 an hour for her 2 boys, Sage age 9 and Hayden age 8. When MPC told her the gas and power were to be cut off the first week of April, she told MPC if she has to choose between feeding her children or paying the bill she would buy food for her boys. In desperation she appealed to HRDC which paid $525 which covered $300 of the MPC bill plus a credit on the next bill. HRDC obtained a 15% discount each month, which

helps but does not relieve the situation. The MPC woman on the phone was rude and insulting causing McCREA to cry. The MPC woman told McCREA either she would do what they wanted her to do or she would be shut off. The first thing the MPC woman asked McCREA was "do you know someone who has a credit card who would pay it for you?" The MPC woman also told McCREA to go to a bank or ask relatives or a friend for the money. Because she did not know how she was going to be able to take care of her children, the frustration caused her to be crying when she went to work. She felt she would never, never catch up. She felt like she had no real value—that she was less than human—that her self-esteem went down to zero or even below. She believed she had no dignity left as a human being.

Plaintiff McGRATH, who is separated, has two children living at her home, 320 W. Daly St., Walkerville: Roxanne, who turned age 16 on 5/24/01, and Nicholas who is 17; that she is working part time; that she has been on LIEAP this past winter; that she thought she had a credit with LIEAP of $177 but apparently it had already been sent to Montana Power Co.; that on 5/9/01 her power was turned off by MPC; it demanded $408 before turning it back on; so her frozen food would not spoil her next door neighbor ran an extension cord to her house to hook up her freezer; that she got an advance of $468 on her salary for May, and paid $408 to MPC to get the power back on. That being unable to pay her higher utility bills has caused her great stress, loss of weight, to have a lower self-image, loss of self-esteem and loss of her human dignity.

Plaintiff McGRATH is the incorporator of plaintiff *Single Moms, Inc.*, a nonprofit corporation.

An MPC spokeswoman on 4/20/01 [Ex. 3] admitted higher gas prices probably contributed to some customers getting behind on the payments the winter of 2000-2001 but that about the same number of customers were sent termination notices as in past years. However, since October, 2000 the applications in a six county area including Silver Bow for federally funded energy assistance has risen from 1,881 to 2,301.

That plaintiffs allege on information and belief that according to the Montana Council of Churches [Ex. 4] 90% of the households in Montana with a hunger problem have children, with single (mostly *female*) parent families particularly at risk. Montana in 1990 had a poverty level of 16.1% and 24.3% of all Montana children below Age 5 [13,980 out of 57,600] live in poverty. 43,237 of 216,898 Montana children live in families with inadequate money for food. These single parent Montana families are the most likely to be the victims of SB 390 and SB 396.

II. Passage of SB 390 & SB 396 ["customer choice"] by 55th legislative assembly was proximate, direct & primary cause of rate increases which in turn damaged plaintiffs

Plaintiffs were denied "customer choice" in that they had no choice. Choice as defined in 69–8–203, MCA (1997) was mythical and illusory. It is economically not feasible, indeed irrational, to duplicate transmission and delivery lines, or for that matter gas-fired turbines, coal or hydro-powered plants.

The constant threat day and night of facing disconnection of power and heating to her home as a result of high utility bills that she cannot pay can and does wreak permanent havoc on the mental and eventually physical health of a single mother with two minor children looking to her for food, warmth and protection. Plaintiffs further allege on information and belief that an estimated 2,170 Montana wage earners including 335 workers at Montana Resources mine in Butte, 585 employees at Columbia Falls Aluminum Co., and estimated 600 employees at Smurfit/Stone Container in Missoula lost or may lose their jobs and ability to support themselves and their families because of SB 390 and SB 396. [The Court is requested to take M.R.Evid. 201(d) judicial notice of these adjudicative facts when plaintiff presents the Court with satisfactory statistical evidence thereof.] Plaintiffs and CLASS suffered damages as a direct and proximate result of the gross and reckless negligence or deliberate actions of defendants MPC and defendant legislators named in Appendix A as voted for SB 390 and SB 396.

Plaintiffs and Others Similarly Situated (CLASS) sustained a violation of their civil and US. constitutional rights including denial of procedural and substantive due process and of equal protection within the meaning of 42 USC §1983 and §1989 and Article II, Sections 3 and 4 of the 1972 Montana Constitution which read:

> **Section 3. Inalienable rights**. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the *rights of pursuing life's basic necessities*, enjoying and

defendant their lives and liberties, acquiring, possessing and protecting property, and seeking their *safety, health* and happiness in all lawful ways, In enjoying these rights, all persons recognize corresponding responsibilities. (emph supp)

Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, *corporation*, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, *sex*, culture, *social origin or condition,* or political or religious ideas. (emph supp)

III. SB 390 and SB 396 served no *"compelling state interest"* but rather the financial interest of MPC which is using the cash from the abortive sale of assets to shore up its investment in Touch America

SB 390 and SB 396 (Chapter 505 of the 55th Montana Legislature) were drafted by MPC, not by the legislature. Acting in concert, MPC and defendant legislators in violation of the constitutional and statutory rights of plaintiffs including CLASS either with gross negligence or in the absence of slight or of any care enacted SB 390 and SB 396 which restructured Montana's electric and natural gas utility industries by providing a fictitious "customer choice", made the then territorial integrity laws meaningless, removed certain rural electric cooperative properties from class seven for tax purposes, and was *deliberately designed to allow the export of power to maximize the profits of the suppliers,*

which raised prices for Montana consumers. That MPC and defendant legislators knew, or in the exercise of reasonable care, should have known SB 390 and SB 396 would raise to prohibitive levels the cost of power and gas for plaintiffs. That, indeed, MPC now admits the legislation it drafted raised prices for commercial and residential users, such as these plaintiffs. [Ex. 3, p.2]

Montana produces between 1,900 and 2,500 megawatts of power annually but only consumes about 1,900. Between them Montana and Wyoming have a 5,000 year supply of coal. Allowing "deregulated" utilities to sell Montana's power to power- starved non–Montana industrial customers out-of-state forced plaintiffs and CLASS to pay confiscatory prices for power and gas. SB 390 gutted the Territorial Integrity Act of 1971 by amending Sections 69-5-101, 69-5-102, 69-5-104, 69-5-105, 69-5-106, 69-5-107, 69-5-108, 69-5-109, 69-5-110, and 69-5-111 while repealing 69-5-103 (eliminating restrictions on electric suppliers in cities and towns of 3,500 or more persons) and adding 69-5-112. The heart of deregulation as drafted by MPC is found in 69-8-204(2) which reads:

> "The commission may not order a public utility to divest itself of any generation assets or prohibit a public utility from divesting itself voluntarily of any generation assets."

In 1999 MPC sold its hydro and coal generation facilities to PP&L for $988 million and is now negotiating to sell its transmission/delivery system to NORTHWESTERN for about $1.1 billion (now pending before PSC) the latter with a proviso MPC pay NORTHWESTERN $50 million if MPC backs out

of the deal; sold its coal business to Westmoreland of Colorado; sold to Continental Energy Services, Inc. its unregulated independent power business for $84.5 million cash; and its oil & gas fields and production for $475 million to Pan Canadian. PSC has on its docket an application from NORTHWESTERN seeking approval of such a transfer. MPC could not have amassed these assets without the money taken from its customers. If the Court orders MPC to renounce the latter contract, the $50 million forfeiture clause should be held *null* and void. *Because these unconstitutional, abortive contracts are recent, none of them have created irreversible rights.* If PP&L or Pan Canadian refuse to deed back to MPC the illegally transferred coal and hydro generating facilities the Clerk of Court should execute such deed(s). MPC should be directed to return to PP&L and Pan Canadian the money received from PP&L plus interest at the current 3 or 12 month T Bill rate.

Destruction of public utility territorial integrity by the negligent, defendant members of the 55th Legislature, 83 of whom accepted contributions from MPC's PAC, violated plaintiffs' civil statutory and U.S. and Montana constitutional rights by depriving them of basic necessities (Art. II, sec. 3) and destroying their dignity as human beings (Art. II, sec. 4) including their right to a clean and healthful environment. The exporting of electrical power created by Montana's natural resources of water and coal has necessitated, *inter alia*, the burning of huge amounts of diesel fuel by locomotives resulting in compounding the problem of polluting Montana's clean air contrary to the "Clean Air Act of Montana", 75-2-101, *et seq.*, Art. II, sec. 3, Art. IX, sec. 1 and the portion of the Preamble listing the "quiet beauty of

our state" and "desiring to improve the quality of life, equality of opportunity" [which the Delegates intended to have the force of law as part of the Bill of Rights and not be a mere poetic, hortatory dream; Transcript, Delegate Marshall Murray, Vol, III, p.37], Montana Constitution. Article IX Section I provides:

Section 1. Protection and improvement.

(1) The state and each person shall maintain and improve a *clean and healthful environment* in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(2) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies *to prevent unreasonable depiction and degradation of natural resources.* (emph supp)

IV. HB 474 signed on 5/5/01 by Gov. Judy Martz is Unconstitutional for same reasons as SB 390 and SB 396 and because HB 474 Purpose Clause contains more than one subject

H.B. 474 enacted by Montana's 57th Legislature is unconstitutional for the same reasons as SB 390 and SB 396. In addition its Purpose Clause contains more than one subject in contravention of Section 11(3), Art. V of the 1972 Constitution.

V. Standard of Review for Constitutionality "Strict Scrutiny"

The standard of review to determine whether a

statute depriving a class (especially a suspect class) of a constitutional or "fundamental" right serves a legitimate state interest is the highest and most stringent standard.

VI. SB 390 & SB 396 violate 1889 Enabling Act because affect plaintiffs "safety and happiness" guaranteed by Declaration of Independence

Enactment of SB 390 and SB 396 also violates Section 4 of The Enabling Act of February 22, 1889 (25 Stat. 676) which reads in relevant part "The constitutions (of Montana, the Dakotas and Washington) shall...not be repugnant to the constitution of the United States (including 'economic' slavery under the Thirteenth Amendment) and the principles of the Declaration of Independence" the latter of which provides in relevant part

> "We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain unalienable rights;...that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed...organizing its powers in such form, as to them shall seem most likely to *effect their safety and happiness.*" (emph supp)

that living in a residence in Butte or elsewhere in Montana in the winter without heat or light constitutes a denial of "life's basic necessities", denial of a "clean and healthful environment" and affects plaintiffs' "safety and happiness".

In summary, disconnecting or threatening to disconnect gas and light service, charging prohibitive utility rates and burning diesel fuel in air-polluting locomotives to generate power damage plaintiffs in violation of the Enabling Act of 1898, the U.S. and the Montana Constitutions and the Clean Air Act of Montana, 75-2-101, *et seq.*, MCA (1997).

VII. Unjust Enrichment—PP&L made unconscionable profits at expense of plaintiffs

Familiar with the ancient warning, *caveat emptor*, prior to agreeing to pay MPC almost one billion dollars for a large portion of MPC's generating facilities, PP&L, is presumed by law to be aware of the public records of Montana including the records of the Commissioner of Political Practices. This means PP&L is presumed by law to know that (1) MPC through its PAC paid over $17,000 to Montana legislators in 1994 and 1996; (2) in 1997 MPC paid a platoon of 18 full time lobbyists over $70,000 to lobby the legislators into passing the complicated deregulation legislation drafted by MPC; (3) this highly organized platoon of 18 lobbyists admitted to paying out over $6,000 to "wine and dine" the legislators most likely to vote "aye" for SB 390 and SB 396; (4) of the 150 members of the legislature only a handful were attorneys [senator-attorney Al Bishop voted "no"] who could possibly begin to have the time—burdened with their other committee assignments—to understand the involved language of SB 390 and SD 396, which MPC's highly skilled–in–utility–law attorneys had over 12 months in which to draft; (5) in 90 days it was impossible for the legislators to comprehend the full import and disastrous economic

consequences of "deregulation"; (6) inability of legislators unschooled in law or economics to comprehend SB 390 and SB 396 would allow the export of power out–of–state following the highest market price; and (7) the 1972 Montana constitution called for annual meetings of the legislature so it would be better informed but a well–financed advertising campaign by powerful lobbyists convinced voters in 1974 to return to biennial sessions. PP&L by law is presumed to have this "guilty knowledge" of how SB 390 and SB 396 came into being. In short, PP&L is not an innocent, *bone fide* purchaser for value within the meaning of Montana's Uniform Commercial Code. If PP&L had a billion dollars to pay cash for Montana's hydro and coal powered generating facilities it had enough money to research the genesis of SB 390/SB 396.

Plaintiffs allege on information and belief that PP&L Montana (PP&L) reported to SEC that in the last quarter of calendar 2000 its *net* earnings amounted to $67.8 million or 3 times as much as its earnings for the first 3 quarters of 2000. These earnings in a state which now has the lowest per capita earnings, replacing Mississippi, a former slave state, as the poorest state in the Union, constitute unjust enrichment. PP&L contends PSC lacks the legal authority to regulate its prices. In the last days of the 2001 legislative session PP&L agreed to sell MPC 500 megawatts of power in 100–megawatt units or 4 cents a kilowatt hour plus 4 cents for delivery—about twice what plaintiffs were paying in 1996—for five years beginning July 1, 2002 when the price cap goes off of MPC's residential and commercial rates. Costs to MPC's customers are expected then to go up another 50%. This arrangement between PP&L

and MPC was reached on condition HB 474 guaranteeing MPC full cost recovery for any power it purchases be passed by the legislature, which Bill was signed by the governor on 5/5/01. The third condition of the arrangement was that PSC drop its demands to regulate PP&L's generating prices. MPC's vice president of regulatory affairs, Pat Corcoran, announced on about May 8, 2001 PP&L and MPC would sign their agreement "in the very near future."

VIII. Did SB 390 & SB 396 constitute a *compelling state interest* or in fact provide a ready means for MPC to finance *Touch America* in violation of Art. V, Sec. 12 prohibiting special legislation?

MPC through its Political Action Committee (hereinafter PAC) gave a total of $17,962 to 1995 and 1997 legislators, PAC paid money to 87% of the members of the 55th Legislature who voted for SB 390, The money PAC paid to members of the 1995 and 1997 legislatures is found opposite the law-makers' names as set forth in Ex. 5a and 5b. Names of law-makers who voted against deregulation are found on Ex 7.

MPC paid 18 registered lobbyists $70,615.37 to lobby the members of the "55th into passing SB 390 & SB 396. Records of the Commissioner of Political Practices note this platoon of 18 lobbyists in the 90 day session admitted wining and dining the members of the 55th in the amount of Six Thousand Five and 94 cents ($6,005.94) to induce them to pass SB 390 and SB 396 for MPC, That the aforesaid economic hardships on the plaintiffs and members of CLASS and unjust enrichment consummated by PP&L were

the direct and proximate result of gross negligence acting in concert on the part of defendants STATE and MPC in that STATE did negligently and knowingly or recklessly and knowingly in the exercise of slight or no care or deliberately enacted SB 390 and SB 396. That SB 390 was amended by motion of Rep. Joe QUILICI on April 15, 1997 guaranteeing to defendants MPC and PP&L "9.5% earned return on average equity" and if not said defendants could "include the flow through of (sufficient) investment tax credits (to guarantee that rate)". In the exercise of reasonable or ordinary or any care the members of the 1997 Legislature should have known the disastrous economic results on plaintiffs and CLASS of SB 390 and SB 396 and the resulting unjust enrichment of defendants MPC and PP&L. QUILICI further moved SB 390 be amended to provide the Legislative Services Division be authorized to accept *gifts* of up to $200,000 from public light and gas utilities to cover the cost of the activities of the transition advisory committee provided these defendants could not charge the ratepayers and, further, if any or all of the $200,000 is obtained by appropriations, said utilities would get their money back. The records of the Commissioner of Political Practices indicate that in the 1994 and 1996 campaigns Rep. QUILICI received no contributions from PAC. In 2000 defendant QUILICI was hired as a lobbyist for MPC [Ex. 6].

That such action on the part of defendant legislators and MPC allowing MPC to charge exorbitant rates rose to at least a level of gross negligence and even a level of an absence of any care to the damage of plaintiffs and CLASS. That South Dakota, Wyoming and Idaho refused to deregulate.

IX. If the Court as a matter of law Finds SB 390 and SB 396 are unconstitutional, and PP&L and other "vendees" are ordered by the Court to return the assets purchased from MPC unconstitutionally, the Court can make the vendees whole by applying traditional "cram down" bankruptcy law principles to allow them an interest rate conforming to the current T Bill rate.

The QUILICI amendment of SB 390 on 4/15/97 guaranteeing MPC and PP&L an earned return on equity of 9. 5% violated Sec. 12, Art. V of the 1972 Constitution as "special legislation" as well as Sec. 11, Art. V in that (1) a "law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose" which was fictitiously and deceptively denominated *customer choice* and (2) each bill "shall contain only one subject, clearly expressed in its title".

Further, if the Court finds SB 390 and SB 396 (and HB 474 of the 57th Legislature) are unconstitutional, and the Court decides in the interest of justice that although the *attempted* sale of its assets by MPC are void because SB 390 and SB 396 are unconstitutional *ab initio* that nonetheless MPC and PP&L are entitled to a fair return on their investments, plaintiffs urge that the Court has authority to rely on U.S. Bankruptcy Court decisions [cfr. ¶ IX, Plaintiffs' Pre-Discovery Disclosure], some of which under the "cram down" provisions of Title 11 of the United States Code guarantee rate-payer creditors such as MPC and PP&L a Tate of return on their investment based on the T Bill rate, it being well accepted by the

investment industry that Treasury Bills are a very safe investment, the current one year rate being 3.875% [EX. 8].

X. Abolition of Immunity

Art. II, Sec. 18 of the 1972 Constitution provides "The state...shall have no immunity from suit for injury to a person or property, except as may be specifically provided by a 2/3 vote of each house of the legislature." No such immunity legislation was ever enacted. In view of the above facts, none of the members of the 55th are immune from suit as individuals under the Act of 1866 as amended in 1871. Nor is the last sentence of Sec. 8, Art. V of the Constitution referring to debate language applicable to votes cast for SB 390 and SB 396.

XI. Although plaintiffs and CLASS have damage claims, they are entitled to injunctive relief because they may be deprived of an adequate remedy if PSC approves the sale to NorthWestern

Because the proposed $1.1 billion sale to NORTHWESTERN is imminent, Plaintiffs and CLASS have no adequate and speedy remedy at law and will suffer irreparable harm within the meaning of Chapter 19 of Title 27 MCA.

XII. Accrual of cause of action

That plaintiff and CLASS did not sustain injury from the passage of SB 390 and SB 396 until late 2000, and therefore their cause of action did not accrue until 2000 not on the legislative effective date,

which is probably irrelevant because of their unconstitutionality.

XIII. Need to Insure ability of MPC to serve plaintiffs

MPC has stopped declaring dividends, the value of its stock has dropped from about $68 down to $12 per share, and it must purchase power in the open market to satisfy the long term Advanced Silicon Materials Inc. (ASIMI) contract in Silver Bow County [75 megawatts at $400 a MW, 24 hours a day or $720,000 a day or $21,600,000 a month]. *Pendente lite*, to insure MPC has the financial strength to continue to supply plaintiffs and CLASS with power and gas service, the Court should appoint some responsible public official such as involuntary plaintiff Montana State Auditor to give to the Court an accurate accounting of the assets MPC has attempted to transfer, what has happened with the cash paid to MPC because of these attempted transfers and the impact of such transfer on the continued ability of MPC to service its present commercial and residential customers. Plaintiffs are financially unable to pay their power & gas bills now. Any deterioration in the ability of MPC to supply their homes with gas and power would worsen an already devastating situation.

COME NOW plaintiffs and for their Second Cause of Action reiterate as if fully set forth at this point all of the above allegations.

That in addition to injunctive relief plaintiffs seek damages in the amount of Five Million Dollars ($5,000,000.00) to be paid to the CLASS plus Twenty

Five Thousand Dollars ($25,000.00) for each of the named plaintiffs plus attorney fees and cost reimbursement as set by the Court.

PRAYER

Plaintiffs pray:

1. The Court declare said SB 390 and SB 396 enacted by the 55th Legislature and HB 474 enacted by the 57th Legislature unconstitutional and void *ab initio* as violative of the 1972 Constitution and the Enabling Act of 1889
2. The Court rule the MPC customers who have been disconnected or threatened with disconnection for non-payment of service charges since December, 1999 be declared members of the Rule 23 CLASS.
3. The Court issue an order restraining MPC from disconnecting the gas and electrical service to any residence or business in Montana and directing MPC to reconnect service forthwith (without requiring a penalty or deposit from the customer) to any residence or business at which such service has already been disconnected for non-payment of a bill unless disconnected at the specific request of the owner or lawful tenant, and to furnish plaintiffs and the State Auditor with a computer printout at MPC's expense of the MPC customers who have been disconnected for non-payment of bills since December, 1999.
4. That after MPC has complied with the order to reconnect said customers it furnish the State Auditor with a printout of the names and addresses of said customers.
5. Within 30 days after MPC furnishes the State

Auditor with said list the State Auditor file with the Clerk of Court for the United States District Court for the District of Montana a statement saying whether MPC has complied with said order, MPC to be directed to reimburse the State Auditor for his costs.

6. That PP&L be ordered to return to MPC the sum of $67.8 million which MPC be ordered to return to ratepayers with no deduction for the cost of such rebate. That the State Auditor report to the Court within 90 days thereafter whether he is satisfied that PP&L and MPC have complied with the Court's Order.
7. That PP&L reimburse the State Auditor for his costs in enforcing the provisions of the Order pertaining to PP&L.
8. That members of the board of directors of MPC be enjoined from disposing any of the MPC stock they hold on the date of the Court's order, provided that any increase in the value of stock, when sold, be surrendered to the State Auditor to be held in a special account under his control pending further order of the Court.
9. PP&L be directed to deed back to MPC the hydro and coal power generating facilities and MPC be directed to return to PP&L $988 million received from PP&L less any profits PP&L made provided PP&L receive a credit for the $67.8 million returned as described in ¶ 6 *supra*. Pan Canadian be directed to deed back to MPC the oil & gas fields and production in exchange for $475 million, PP&L and Pan Canadian to receive Interest on their Investment at the 3 or 12 month T Bill rate.
10. The fact-finder assess damages in favor of

plaintiffs and the CLASS as set forth above for the mental anguish, physical suffering and injury and economic and hedonic loss sustained by plaintiffs and members of the CLASS.

11. Assess reasonable attorney fees and costs to plaintiff for obtaining equitable relief and relief under applicable Montana statutes and 42 USC 1988.
12. For such other and further relief as the Court deems just under the circumstances.

Respectfully submitted

Robert C. Kelleher, Sr.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify I mailed a true and correct copy of the Amended Complaint to the following in envelopes containing sufficient first class postage:

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Dated at Butte, MT this 14th day of June, 2001.

Robert C. Kelleher, Sr.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SINGLE MOMS, INC., a non-profit corporation; DERILYN DORSCHER, individually and on behalf of her minor children; CHRISTINE MCCREA, individually and on behalf of her minor children; MARY KAY MCGRATH, individually and on behalf of her minor children,

Plaintiffs-Appellants,

v.

MONTANA POWER COMPANY, a Montana corporation; PENNSYLVANIA POWER & LIGHT, a Pennsylvania corporation; NORTHWESTERN CORPORATION, a South Dakota corporation; PANCANADIAN ENERGY, an Alberta corporation; MONTANA STATE HOUSE OF REPRESENTATIVES, The 55th Legislative Session Members; MONTANA STATE SENATE, The 55th Legislative Session Members; ENCANA ENERGY RESOURCES, INC.,

Defendants-Appellees.

No. 02-35361

D.C. No. CV-01-00046-DWM

OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted June 3, 2003*
Seattle, Washington

Filed June 10, 2003

Before: Donald P. Lay,** Warren J. Ferguson, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Gould

*This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

**The Honorable Donald P. Lay, Senior United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

COUNSEL

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G. Steven Brown, Helena, Montana, and Dennis R. Lopach, Northwestern Corporation, for defendant-appellee Montana Power Company.

Chris D. Tweeten, Montana Attorney General's Office, Helena, Montana, for defendant-appellee Montana legislators.

Michael Lesch and Stephen H. Orel, LeBoeuf, Lamb, Greene & MacRae, New York, New York, and Robert M. Murdo, Jackson, Murdo, Grant & McFarland, Helena, Montana, for defendant-appellee PPL Montana.

Kellie M. Gaston, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Montana, for defendant-appellee Encana Energy Resources, Inc.

OPINION

GOULD, Circuit Judge:

The plaintiffs, a group of single Montana mothers, appeal from the district court's dismissal of their 42 U.S.C. § 1983 claims against the defendant Montana Power Company (MPC), an electric and natural gas utility company. The plaintiffs claim that MPC violated their constitutional rights when MPC hired lobbyists to influence the Montana legislature to enact legislation to deregulate the Montana energy markets. Because MPC's lobbying efforts were not "state action" implicating the single mothers' constitutional rights, and because we reject the plaintiffs' other claims, we affirm the district court's dismissal.

I

In the mid-1990s, defendant MPC paid about $70,000 to professional lobbyists in exchange for the lobbyists' efforts to influence the Montana legislature to deregulate Montana's energy markets. MPC's lobbyists spent about $6,000 entertaining Montana legislators, and MPC's "political action committee" contributed about $17,000 to legislators' campaign funds.

In 1997, the Montana legislature enacted the Electric Utility Industry Restructuring and Customer Choice Act, Mont. Code Ann. § 69-8-101 *et seq.*, and the Natural Gas Utility Restructuring and Customer Choice Act, Mont. Code Ann. § 69-3-1401 *et seq.*, which were designed to give Montana customers the freedom to choose their energy suppliers. *See*

Mont. Code Ann. § 69-8-102 *et seq.*; Mont. Code Ann. § 69-3-1403. One consequence of energy deregulation, according to the plaintiffs, was an electricity and gas rate increase.

The plaintiffs, who say they are too poor to buy gas and electricity in the newly deregulated Montana utility market, filed suit in federal district court under 42 U.S.C. § 1983 claiming that MPC violated their rights under the United States and Montana Constitutions. Specifically, the plaintiffs claim that MPC violated their federal Fourteenth Amendment substantive due process and equal protection rights and violated their Montana constitutional rights to equal protection and "to pursue life's basic necessities." The plaintiffs also filed suit against eighty-three Montana legislators and two energy companies in addition to MPC. The plaintiffs sought $5 million in money damages for a class of single Montana mothers, $25,000 for each single mother identified in its amended complaint, and an injunction forbidding MPC from disconnecting the single mothers' gas and electrical services if they fail to pay for services in the future.[1] The district court granted the defendants' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). The plaintiffs appeal.

II

The plaintiffs claim that MPC—a privately owned and operated corporation—violated their rights under the United States and Montana Constitutions by hiring lobbyists and attempting to influence the legislature.[2] We affirm the district court's dismissal of these constitutional claims because MPC's lobbying acts are not attributable to the State of Mon-

[1]The district court denied the plaintiffs' request for an injunction, and we summarily affirmed the district court's decision in an unpublished disposition. *See Single Moms, Inc. v. Montana Power Co.*, No. 01-35756, 2001 WL 1398480 (9th Cir. Nov. 8, 2001).

[2]We review de novo the district court's dismissal for failure to state a claim. *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003).

tana or to any other government entity and so cannot violate the plaintiffs' constitutional rights.

[1] We begin with the plaintiffs' federal constitutional claims. The United States Constitution protects individual rights only from *government* action, not from *private* action.[3] Only when the *government* is responsible for a plaintiff's complaints are individual constitutional rights implicated. *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288, 295 (2000). So MPC cannot violate the plaintiffs' Fourteenth Amendment substantive due process or equal protection rights unless the State of Montana is somehow responsible for MPC's lobbying activities.

[2] The Supreme Court has held that an ostensibly private organization or individual's action may be treated as the government's action "if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Academy*, 531 U.S. at 295 (internal quotation marks omitted). *See also Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002).[4] The Supreme Court has identified facts that bear on whether private action may be treated as that of the state. The Court has held, for example, that a challenged

[3] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (observing that "most rights secured by the Constitution are protected only against infringement by governments") (internal quotation marks and citations omitted). *See also United States v. Morrison*, 529 U.S. 598, 621 (2000) (holding that the Fourteenth Amendment " 'erects no shield against merely private conduct, however discriminatory or wrongful' ") (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

[4] In determining whether MPC's lobbying efforts constituted "state action" sufficient to implicate the federal Constitution's Fourteenth Amendment, we also necessarily determine whether MPC's action occurred "under color of state law" within the meaning of the Supreme Court's § 1983 jurisprudence. *See Brentwood Academy*, 531 U.S. at 295 n.2 ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes.").

action by a private actor may be state action when: (1) the government compelled the action using its "coercive power" or provided "significant encouragement, either overt or covert," for the action, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); (2) the government and the private actor willfully participated in joint activity, *Lugar*, 457 U.S. at 941; (3) the government controlled a nominally private actor, *Pennsylvania v. Bd. of Dirs. of City Trusts of Philadelphia*, 353 U.S. 230, 231 (1957) (per curiam); or (4) the government delegated a "public function" to the private actor, *cf., e.g., West v. Atkins*, 487 U.S. 42, 56 (1988); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-628 (1991); *Evans v. Newton*, 382 U.S. 296, 299, 301, (1966).

[3] MPC's efforts to influence the passage of legislation by lobbying state legislators bore no characteristics that would render the company's actions fairly attributable to the State of Montana. This is so because, accepting the plaintiffs' allegations as true, MPC influenced the State of Montana, rather than the reverse.

[4] First, the State of Montana did not exercise "coercive power" or provide "significant encouragement" to MPC. *Blum*, 457 U.S. at 1004. Rather, MPC provided encouragement to the State of Montana.

[5] Second, neither the State of Montana nor its agents "willfully participated in joint activity" with MPC, *Lugar*, 457 U.S. at 941, even if, as the plaintiffs allege, MPC lobbyists drafted and proposed the Montana statute that was enacted by the legislature. The legislators in carrying out their public duties were not "agents" of the State of Montana. When state legislators consider, draft, and vote for a statute—even if they do so with a constituent's help—they are legitimately executing the duties of their offices, not acting for the state with private parties in a "joint activity." Moreover, MPC's lobbyists were acting for MPC's private interests and not for the state.

[6] Third, the State of Montana does not "control" MPC, though it does regulate many particulars of MPC's business. That a private entity is regulated by government does not transform that private entity's conduct into state action. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-51 (1974) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most utilities, do so.") (citation omitted).

[7] Fourth, the State of Montana has not delegated a "public function" to MPC. MPC's petitioning of the government is a quintessential private function. *See E. R.R. Presidents Conf. v. Noerr*, 365 U.S. 127, 137 (1961).

[8] We hold that MPC's efforts to influence lawmakers through lobbying were private acts not fairly attributable to the State of Montana. *See First Nat'l. Bank of Omaha v. Marquette Nat'l. Bank of Minneapolis*, 636 F.2d 195, 198 (8th Cir. 1980) (holding without discussion that a bank's lobbying activities designed to obtain the passage of a Minnesota statute were not "state action").[5] MPC's lobbying activities thus

[5]The Tenth Circuit has held that the New Mexico State Bar's employment of a lobbyist "to influence members of the State Legislature on issues of public policy" constituted "state action." *Arrow v. Dow*, 636 F.2d 287, 289 (10th Cir. 1981). *Arrow* is not inconsistent with our holding. In *Arrow*, unlike here, the entity that hired the lobbyist was a state agency. *See id.* (noting that the Supreme Court of New Mexico created the Bar, adopted its governing rules, and required all lawyers to be members). *See also Hass v. Or. State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989) (holding that there is "no doubt that the [Oregon] Bar is a public body, akin to a municipality for the purposes of the state action exemption" from the Sherman Act); *Barnard v. Chamberlain*, 897 F.2d 1059, 1062 (10th Cir. 1990) (holding that Utah State Bar's publishing of a newspaper was "state action" since the Utah State Bar is a governmental entity established by state law and created as an administrative agency of the Utah Supreme Court).

could not have violated the plaintiffs' federal constitutional rights.

Even if there existed significant government involvement in MPC's actions, we nonetheless would hold that MPC's actions were not fairly attributable to the State of Montana. The Supreme Court has held that there may be "some countervailing reason against attributing activity to the government," even if facts suggest significant government involvement in private action. *Brentwood Acad.*, 531 U.S. at 295-96. Here, MPC's lobbying was an exercise of its lawful First Amendment right to petition the government, and that is a countervailing reason against attributing MPC's activity to the State of Montana.

The Supreme Court has stressed the importance of citizens' exercising their First Amendment right to petition the government:

> In a representative democracy such as this, [the legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.

Noerr, 365 U.S. at 137. If we deemed citizens' lawful and protected efforts to influence government "state action," then citizens could be held liable whenever their political activities played a role in government action later determined to have been unconstitutional. Such a holding would create a new category of state action (lobbying) and a new battlefield—the nation's courtrooms—in political contests. Such a holding also would have a chilling effect on legitimate political expression in derogation of the First Amendment. It would threaten to deprive government of useful information that private citizens might otherwise provide. This is a significant countervailing reason against attributing MPC's lobbying

activity to the government. MPC's lobbying activities were the typical actions of a private individual or corporation that seeks to tell lawmakers what it wants or needs from government; such lobbying activities, whether an aid or a hindrance to good governance, are not "state action" implicating individual constitutional rights.

[9] Having rejected the plaintiffs' federal constitutional claims, we turn to the plaintiffs' state constitutional claims. Like the United States Constitution, the Montana Constitution protects individual rights from *government* action, not *private* action. *See, e.g., Montana v. Long*, 700 P.2d 153, 157 (Mont. 1985) (holding, "in accordance with well-established constitutional principles," that the Montana Constitution's privacy right protects against "state action only"); *Gulbrandson v. Carey*, 901 P.2d 573, 578 (Mont. 1995) (holding that Montana Constitution's Equal Protection Clause protects against "arbitrary and discriminate *state action*") (emphasis added); *In re: Yellowstone River*, 832 P.2d 1210, 1214 (Mont. 1992) (holding that the Montana Constitution protects water rights against "unreasonable *state action*") (emphasis added). So MPC cannot violate the single mothers' Montana constitutional rights to equal protection, Mont. Const. Art. II, § 4, and to "pursu[e] life's basic necessities," Mont. Const. Art. II, § 3, unless the State of Montana is responsible for MPC's lobbying activities.

[10] The parties have not cited, nor have we found, any Montana judicial decision addressing whether or when private action may constitute "state action" for purposes of the Montana Constitution. However, the Montana Supreme Court frequently has looked to the United States Supreme Court's interpretations of the United States Constitution for guidance in interpreting similar concepts in the Montana Constitution, *see, e.g., Gulbrandson*, 901 P.2d at 578 (looking to United States Supreme Court cases for guidance on equal protection); *Montana v. Christensen*, 797 P.2d 893, 895-97 (Mont. 1990) (looking to United States Supreme Court cases for guidance

on the exclusionary rule), and we conclude the Montana Supreme Court would do so here. Because MPC's lobbying was not "state action" implicating the United States Constitution, we hold that MPC's lobbying also was not "state action" implicating the Montana Constitution. The district court properly dismissed the plaintiffs' Montana constitutional claims.[6]

III

The plaintiffs also appeal the district court's dismissal of their claims against eighty-three Montana legislators and two energy companies in addition to MPC. We affirm the district court's dismissal of these claims.

[11] First, the plaintiffs claim that the defendant Montana legislators violated the single mothers' constitutional rights when the legislators voted to enact legislation deregulating the Montana energy markets. But because the Montana legislators "have an absolute common-law immunity against civil suit for their legislative acts," *Chappell v. Robbins*, 73 F.3d 918, 920 (9th Cir. 1996), the district court properly dismissed the claims against them.

[12] Second, the plaintiffs claim that defendants Pennsylvania Power & Light (PPL) and Encana Energy Resources, Inc., were "unjustly enriched" by certain transactions that occurred after the deregulation of Montana's energy markets. Taking as true the plaintiffs' factual allegations, as we must at this stage, the plaintiffs nonetheless failed to allege that either PPL or Encana engaged in misconduct or possesses property that properly belongs to the single mothers. *See Sebena v. Mon-*

[6]To the extent the plaintiffs allege that MPC's disconnecting or threatening to disconnect them from the power grid for nonpayment of their bills violated their state or federal constitutional rights, the plaintiffs' claims are not cognizable because those actions also were not "state action." *See generally Jackson*, 419 U.S. at 353 ("[C]ourts have rejected the contention that the furnishing of utility services is either a state function or municipal duty.").

tana, 883 P.2d 1263, 1268 (Mont. 1994); *Lawrence v. Clepper*, 865 P.2d 1150, 1156 (Mont. 1993). The plaintiffs failed to state an unjust enrichment claim under Montana law, and the district court properly dismissed its claims against PPL and Encana. Moreover, to the extent the plaintiffs' claims against PPL and Encana were brought under § 1983, the district court properly dismissed them because the plaintiffs failed to allege that the companies violated the single mothers' federal constitutional or statutory rights and because the companies were not acting "under color of law." 42 U.S.C. § 1983.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR DISTRICT OF MONTANA
Butte Division

OPINION AND ORDER
CV 01–46–BU–DWM

SINGLE MOMS, INC., et al.,

Plaintiffs,

vs.

MONTANA POWER COMPANY, et al.,

Defendants.

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MISSOULA, MT

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I. Introduction

In 1997, the Montana Legislature passed Senate Bills 390 and 396 as the "Electricity Utility Industry Restructuring and Customer Choice Act of 1997," M.C.A. § 69–8–101 et seq., deregulating the utility industry in Montana. In its lobbying efforts to encourage passage of these bills into law, Defendant Montana Power Company made payments totalling $70,615.37 to eighteen different lobbyists. The 55th Montana Legislature passed the Deregulation Act of 1997 at a time when Montana's electricity prices were the highest in the region. Pursuant M.C.A. § 69-3-1401, regulation of consumer rates remains under the purview of the Montana Public Service Commission, despite deregulation of power purchases.

On November 2, 1998, Pennsylvania Power and Light Global, Inc. announced the $988 million purchase of 11 hydroelectric plants and one coalfired plant from MPC. MPC also sold its unregulated wholesale power business to Continental Energy of Stevensville, Maryland, for $85.5 million and its electrical transmission and distribution properties to NorthWestern Corp. of Sioux Falls, South Dakota, for $1.1 billion. PanCanadian Energy, Inc. purchased MPC's exploration, midstream, production and marketing division for $475 million. MPC has announced that it intends to reinvest income from the sales in Touch America, MPC's telecommunications subsidiary.

On May 28, 2001, Plaintiffs filed this suit against MPC, PPLM, NorthWestern, PanCanadian, Continental Energy, and the members of the House and Senate, of Montana's 55th Legislative Session who voted for the act, alleging violations of 42 U.S.C. § 1983 & 1988, the United States Constitution, and the 1972Montana Constitution. Plaintiffs seek relief in

the form of an injunction against MPC forbidding the disconnection of any gas or electrical services and compelling a report to the state auditor of all disconnected customers, the return of $67.8 million to MPC customers from PP&L, voiding of all the above sales under the 1997 utility deregulation and damages for pain and suffering and economic losses.

Plaintiffs filed an Amended Complaint on June 15, 2001 and voluntarily terminated Continental Energy from this matter. After conducting a hearing on June 27, 2001 this Court denied Plaintiffs' Motion for a Temporary Restraining Order, treating it as a Motion for Preliminary Injunction. That Order has been affirmed by the Ninth Circuit on appeal.

Pending before the court are individual Motions to Dismiss filed by Defendants PPLM, NorthWestern, PanCanadian, the 55th Montana Legislature, and the Montana Power Company.

II. Analysis

A. Rule 12(b) (6) Standard

In considering whether to dismiss pursuant to Federal Rule of Civil Procedure 12 (b) (6), the question becomes whether in the light most favorable to plaintiffs the complaint states any valid claim for relief. Conley v. Gibson, 355 U.S. 41, 78 (1957). "The issue is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims." Scheuer v.Rhodes, 416 U.S. 232, 236 (1974).

B. 42 U.S.C. § 1983

To state a claim under 42 U.S.C. § 1983 there must be a "deprivation of a federal constitutional or statutory right" "under color of state law" Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). "Color of state law" goes to the original intent of the Civil

Rights laws. Monroe v. Pape, 365 U.S. 167, 170 (1961) (the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law... carrying out the principles of the civil rights bill, which has since become a part of the Constitution.")

Title 42 U.S.C. § 1983, states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory... subjects, or causes to be subjected, any citizen of the United States or other person... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

State regulation of a public utility is not considered to be under color of state law or "state action." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-352 (1974). Although the Montana Public Service Commission approved the transaction between MPC and PPLM, Plaintiffs here have, not established a nexus between the State of Montana and the challenged result of increased utility rates.

"[C]ourts have rejected the contention that the furnishing of utility services is either a state function or municipal duty." Jackson, 419 U.S. at 353 (testing the theory of a private utility company's actions under color of state law). The Montana Public Services Commission does regulate MPC, and MPC does enjoy a monopoly in Montana; however, neither heavy regulation by the state nor monopoly status brings the action here "under color of state law." Id. at 351.

To act under color of state law within the meaning of 42 U.S.C. § 1983 there must be "usurpation or

corruption of official power by the private litigant, or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree." Lugar v. Edmondson Oil Co., 457 U.S. 922, 926 (1982).

Plaintiffs make a claim under § 1983 against MPC, alleging a "violation of their civil and U.S. constitutional rights including denial of procedural and substantive due process and of equal protection within the meaning of 42 USC § 1983 and § 1988." The "federal constitutional or statutory right[s]" that Plaintiffs plead are "safety and happiness" and "human dignity." Essentially, Plaintiffs seem to claim that the funds that MPC expended on lobbying and influencing passage of the Deregulation Act amount to a civil rights violation under § 1983, apparently claiming that this was a usurpation or corruption of state power. MPC neither usurped not corrupted state power by expending $70,615.37 in 1997 on lobbying. MPC neither deprived Plaintiffs of a federally guaranteed right nor acted under color of state law here.

Plaintiffs make claims against PPLM under 42 U.S.C. § 1983, alleging that PPLM made unconscionable profits ("unjust enrichment") from Plaintiffs and had presumptive knowledqe of MPC's and the 55th Montana Legislature's wrongdoing in passing the Deregulation Act of 1997. No such corruption of the Montana legislature or lack of independence on the part of MPSC can be found in PPLM's purchase of power plants. PPLM played no discernible part in MPC's lobbying efforts and had no compromising influence on the MPSC's allowance of the purchase of power plants, nor have Plaintiffs alleged any such influence. No cause of action lips against PPLM

under 42 U.S.C. § 1983.

C. Unjust Enrichment

Plaintiffs' also claim "unjust enrichment" against PPLM. "The phrase 'unjust enrichment' is used...to characterize the result...of a failure to make restitution...for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefore." Lawrence v. Clepper, 263 Mont. 45, 53, 865 P.2d 1150, 1156 (1993). Here, the original purchase from MPC and the prices levied on electrical suppliers constitute the "benefit" which is required for "unjust enrichment." The control of such benefits is under the exclusive jurisdiction of the Federal Energy Regulatory Commission if such wholesale benefits are across state lines. 16 U.S. C. § 824 (a)–(c).

Any benefits received by PPLM would have been at the expense of MPC and other out-of-state suppliers. It is an impermissible stretch of scope to attribute the $67.8 million earnings of PPLM in 2000 to Plaintiffs' MPC bills. Any arguments whether the rates were unconscionable would be exclusively under the jurisdiction of FERC and would be properly brought by wholesalepurchasers of power in privity with PPLM. Plaintiffs have no cause of action under "unjust enrichment" and dismissal is proper here.

D. NorthWestern's Rule 12 (b) (6) Motion

Plaintiffs here ask for "injunctive relief because they may be deprived of an adequate remedy if the Public Service Commission approves the sale to NorthWestern." The PSC approved this sale in late January of 2002.

NorthWestern had no input into the 1997 lobbying efforts of MPC; it has transacted no business with anyone pending MPSC's consideration of its $1.1 billion bid to MPC. It has no privity with any Plaintiff, excepting MPSC as an involuntary plaintiff; and it has, encouraged Plaintiffs to seek redress of grievances through the MPSC approval process. When viewed in a light most favorable to Plaintiffs, there is no valid claim for relief in this Court against NorthWestern .

E. PanCanadian' s Rule 12 (b) (4) (5) , & (6) Motion

Fed. R. Civ. P. 12 (b) 4 & 5 allow for the quashing of a cause of action for insufficiency of process or service of process. However, the usual remedy is quashing, not dismissal, where there is a reasonable prospect for subsequent effective service. Electrical Specialty Co. v. Road and Ranch Supply. Inc., 967 F.2d 309, 313-314 (9th Cir. 1992) Here there is no question that the naming and service were improper, but quashing is the proper remedy, not dismissal. However, PanCanadian has also moved for dismissal under Fed. R. Civ. P.12(b) 6.

Plaintiffs, in their Amended Complaint, ask for a rescission of contract between MPC and PanCanadian. PanCanadian had no part in the passage of deregulation laws, and has dealt only with MPC and MPSC—not with any of the voluntary plaintiffs—and opposes a contract rescission previously approved by one of the involuntary Plaintiffs, MPSC. PanCanadian also plays no role in any threatened or actual utility disconnections. Plaintiffs state no valid claim in this Court against PanCanadian.

F. The 55th Montana Legislature's Motion to Dismiss.

Corporate lobbying enjoys First Amendment protection. First National Bank of Boston v. Bellotti, 435 U.S. 765, 766 (1978)

> ("the expression of views on an issue of public importance, is at the heart of the First Amendment's concern. There is no support in the First or Fourteenth Amendment...that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation ... ").

On the publicly important issue of deregulation of utilities, MPC's expenditure of $70,615.37 in lobbying efforts constituted no legal impropriety.

Legislators enjoy immunity from prosecution when acting in their capacity as lawmakers. "These [immunities] are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil, or criminal." Tenney v. Brandhove, 341 U.S. 367, 373-374 (1951). This immunity specifically addresses legislators who are believed to have acted improvidently or corruptly. Supreme Court of Virginia v. Consumers Union of the U.S., 446 U. S. 719, 732, 733 (1980) .

The 83 Montana legislators who voted for the Deregulation Act of 1997 were dealing with a controversial issue in their official capacity as legislators. Many citizens, corporations, and lawmakers who contemplated deregulation believed that utility rate reductions would follow deregulation. The nation's equivocal attitude toward power regulation was expressed by The Boston Globe in 1997; "Even most critics of deregulation agree that the high cost of power in Massachusetts means deregulation is inevitable...and that competition is the way to drive

down prices." The Boston Globe C4 (Nov. 18, 1997). Considerable debate on all sides of the issue of deregulation took place in 1997. Whether or not it turned out to be correct in the short, mid, or long term, reasonable interpretation of the situation in 1997 based on experiences at the time was that allowing the invisible hand to control the free market in utilities would cause prices to drop for end users. Regardless, the 83 Montana legislators are immune from suit in the current action addressing their decisions as lawmakers under Tenney, supra.

G. Montana Constitutional claims

Article II, § 3 & 4 of the Montana Constitution guarantees "the rights of Pursuing life's basic necessities," "seeking their safety, health...," and "individual dignity." The federal Constitution does not address the right to "life's basic necessities" or to have electrical power without payment. Plaintiffs argue that the Montana Constitution's Declaration of Rights encompasses the right to not be disconnected from a utility provider arguing that utilities must be construed as life's basic necessities.

Shutting off power for failure to pay power bills does not reach any enumerated fundamental right under the Montana Constitution. This Court need not declare unconstitutional laws leading to the rights and abilities of MPC to shut off Plaintiffs' power.

Since no fundamental right has been infringed, this Court must only decide whether the legislation was colorably reasonable under the circumstances existing in 1997. Considerable debate on all sides of the issue of deregulation took place in 1997.
A reasonable interpretation of the situation in 1997 based on experiences at the time was that allowing the invisible hand to control the free market in

utilities would cause prices to drop for end users. The Deregulation Act of 1997 is reasonable and rationally related to a legitimate state purpose, namely regulating commerce.

Wherefore IT IS HEREBY ORDERED that:

1. Pennsylvania Power and Light Montana's Motion to Dismiss (docket #26) is GRANTED.
2. NorthWestern Corporation's Motion to Dismiss (docket #56) is GRANTED.
3. PanCanadian Energy's Motion to Dismiss (docket #28) is GRANTED.
4. The 83 members of the 55th Montana Legislation's Motion to Dismiss (docket #20) is GRANTED.
5. Montana Power Company's Motion to Dismiss (docket #50) is GRANTED.
6. All other pending motions are DENIED as moot.

All claims against all parties having thus been dismissed, IT IS FURTHER ORDERED that this matter is DISMISSED.

Dated this _____ day of February ,2002

United States Supreme Court

cc Jacobson
Tweeten
Dyre
Richardson
Kelleher
Lopach
Brown
Murdo

APPENDIX D

Section One, Fourteenth Amendment *(Ratified July 9, 1868)*: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section Four, Article IV: The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.